

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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FILE: B-185571

DATE: March 1, 1976

MATTER OF: Royal Industries

DIGEST:

Where protester alleges failure of low bidder to complete "Affirmative Action Program" clause of IFB applicable to bidders who bid \$50,000 or more and have 50 employees or more renders low bid nonresponsive, protest is denied since at time of bid opening bidder did not have 50 or more employees. Further, even if clause was applicable, ASPR § 2-405(vi) specifically permits waiver of failure to complete, and since it concerned bidder responsibility rather than bid responsiveness it could have been completed after bid opening in any event.

By letter dated December 18, 1975, Royal Industries, Energy Products Division (Royal), has protested the proposed award of a contract to Pastushin Aviation Company (Pastushin) pursuant to invitation for bids (IFB) No. N00019-76-B-0002, issued by the Naval Air Systems Command on October 20, 1975. The IFB, requiring delivery of 689 Aero-2D external fuel tank assemblies, first article testing, and associated technical data was opened on December 9, 1975. The following bids were received:

<u>BIDDER</u>	<u>TOTAL</u>
Pastushin Aviation Division, Swiss Electro Instruments, Inc.	\$1,316,530.00
Royal Industries, Energy Products Div.	\$1,421,897.00
Verco Industries	\$1,604,407.71
Sargent Fletcher Co.	\$1,620,470.28
G. S. E. Dynamics, Inc.	\$8,284,220.00

Royal alleges that Pastushin failed to complete section B-3 of the IFB entitled "Affirmative Action Program (1973 April) (ASPR 7-2003.14(b)(2))" and thereby submitted a nonresponsive bid. The Navy agrees with Royal that Pastushin did not complete section B-3 of the IFB. However, the Navy contends that section B-3 is applicable only to bidders with 50 or more employees. Since Pastushin allegedly did not have 50 or more employees at the time of bid opening, the Navy argues that the clause was inapplicable and did not have to be completed by Pastushin.

Section B-3 of the instant IFB states:

"(The following representation shall be completed by each offeror whose offer is \$50,000 or more and who has 50 employees or more.)

"The Offeror represents that he ☐ has, ☐ has not, developed and maintained at each of his establishments Equal Opportunity Affirmative Action Programs, pursuant to 41 CFR 60.2."

Although Royal contends that section B-3 is applicable to Pastushin because its offer was more than \$50,000, we note that the exact wording of section B-3 is "* * * \$50,000 or more and who has 50 employees or more." (Emphasis supplied.) Use of the word "and" indicates that the representation must be completed only by those bidders to whom both of the stated criteria apply, i.e., who bid \$50,000 or more and have 50 employees or more. Since Pastushin allegedly did not have 50 employees or more at the time of bid opening, we conclude that the clause was inapplicable and did not have to be completed by Pastushin.

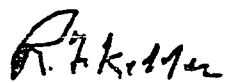
Furthermore, the Navy correctly points out that even if the clause was applicable to Pastushin, its failure to complete the clause is specifically waivable as a minor informality under Armed Services Procurement Regulation (ASPR) § 2-405(vi) (1975 ed.).

Moreover, contrary to Royal's assertion that the failure to complete section B-3 would render Pastushin's bid nonresponsive,

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the instant clause goes to the matter of bidder responsibility rather than bid responsiveness since "i/t is clear that the clause in question is merely for informational purposes and does not purport to bind the bidder to any course of action or other obligation upon acceptance of the bid." Allis-Chalmers Corporation, 53 Comp. Gen. 487, 489 (1974), 74-1 CPD 19. It is on this basis that the cases which Royal cites to support its contention can be distinguished, e.g., Weaver Construction Company, B-183033, March 14, 1975, 75-1 CPD 156; Burnham Construction Company, B-183361, June 9, 1975, 75-1 CPD 348; Astro Pak Corporation/Diversified Chemical Corporation, B-183556, August 8, 1975, 75-2 CPD 97. Those cases concern clauses which clearly purport to bind bidders to a course of action, and therefore, are concerned with bid responsiveness rather than bidder responsibility. Since clause B-3 concerns the matter of bidder responsibility, the representation in question, even if applicable, could have been furnished after bid opening. Allis-Chalmers Corporation, supra.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States